No. 89-260

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF IDAHO, PETITIONER

v.

LAURA LEE WRIGHT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an out-of-court statement by respondent's child that she had been sexually abused had the particularized guarantees of trustworthiness needed to justify its admission under the Confrontation Clause.

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INTEREST OF THE UNITED STATES

The question presented is whether an out-of-court statement by a child that she had been sexually abused-had the particularized guarantees of trustworthiness needed to justify its admission under the Confrontation Clause. The United States prosecutes many cases involving child abuse because of its prosecutorial responsibilities with respect to the District of Columbia, federal territories, and the military. See also 18 U.S.C. 2243. As this Court has recognized, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). In many cases, the victim is either too young or too frightened to testify in a courtroom setting, or would experience traumatic effects from doing so. Thus, the admissibility of a child's statement describing sexual abuse is often a critical factor in determining whether an

abuser is prosecuted and convicted. For that reason, the United States has a significant interest in the resolution of the Confrontation Clause issue presented in this case.

STATEMENT

1. In 1982, respondent separated from her husband, Louis Wright. They informally agreed that each parent would have custody of their one-year-old daughter during consecutive six-month periods. In April 1984, respondent had a second daughter, fathered by Robert Giles, with whom respondent was then living. On October 7, 1986, pursuant to her arrangement with Wright, respondent took custody of her older daughter. Pet. App. 24.

On November 8, 1986, respondent's older daughter revealed to Cynthia Goodman, Louis Wright's girlfriend, that her mother and Giles had sexually abused her and her sister. The next day, Goodman reported that statement to the police. Three doctors examined the older daughter that day and found evidence of sexual abuse. One of the examining physicians was Dr. John Jambura, a pediatrician with extensive experience in child abuse cases. Pet. App. 24-25, 59.

On the same day, a police officer and social worker took the younger daughter into custody. Dr. Jambura examined her the following day. At the time, the younger daughter was two-and-one-half years old. In the course of his examination of the younger daughter, Dr. Jambura found conditions "strongly suggestive of sexual abuse with vagina contact." He further believed that the trauma he had observed in the vaginal area had occurred "approximately two to three days prior to the examination." Pet. App. 25, 55-58.

In the course of the examination, Dr. Jambura conversed with the younger child. He began with "chitchat," asking her questions such as what she had for breakfast. The child answered in a "relaxed" and "animated" fashion. Dr. Jambura then turned to her domestic life, asking her "how are things at home." After moving to that topic, he asked four specific questions: "Do you play with daddy? Does daddy play with you?

Does daddy touch you with his pee-pee? Do you touch his pee-pee?" Dr. Jambura established that "pee-pee" generally connoted the genital area. Pet. App. 60-62.

At trial, Dr. Jambura testified, on direct examination by the State, that the child answered as follows:

> Q. [W]hat was, as best you recollect, what was her response to the question "Do you play with daddy?"
>
> A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.
>
> Q. And "Does daddy play with you?" Was there any response?
>
> A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.
>
> Q. And then what did you say and her response?
>
> A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.
>
> Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?
>
> A. Yes.
>
> Q. What did you observe?
>
> A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.
>
> Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?
>
> A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

Pet. App. 61-62; J.A. 122-123.

2. In May 1987, respondent and Giles were tried jointly before a jury on two counts of lewd conduct with a minor under

16, in violation of Idaho Code § 18-1508 (1987). At the time of trial, the younger daughter was three. Following a voir dire examination of the child, both respondent's counsel and the State agreed that the child was not competent to testify, as she was unable to communicate in a trial setting. Pet. App. 3, 27, 29; J.A. 32-39. The older child, who was six at the time, did testify. She stated that Giles had had intercourse with her sister, while respondent had held the younger child's legs and covered her mouth so she would not scream. Pet. App. 24 n.1; J.A. 61.

Dr. Jambura testified about his examinations of the two girls. Over the objections of respondent and Giles, the trial court permitted Dr. Jambura to testify about his conversation with the younger child during the examination. Pet. App. 3-4, 25-27; J.A. 108. The trial court found this evidence admissible under Idaho's residual hearsay exception, Idaho R. Evid. 803(24).[1] Pet. App. 20-31; J.A. 112-115. The jury convicted respondent and Giles on both counts, and respondent appealed.[2]

3. The Idaho Supreme Court reversed respondent's conviction on the count regarding the younger daughter. The court held that the admission of the child's hearsay statements violated respondent's confrontation rights.

The court began by stating that statements that fit within a "well-established exception" to the hearsay rule are generally admissible under the Confrontation Clause. Evidence admitted pursuant to the "catch-all" provision of Idaho R. Evid. 803(24), however, "should be considered 'presumptively unreliable and inadmissible for Confrontation Clause purposes' absent a 'showing of particularized guarantee of trustworthiness.' " Pet. App. 7. Applying those principles, the court concluded that the statements made to Dr. Jambura lacked the particularized guarantees needed to satisfy the Confrontation Clause. *Id.* at 8-17.

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[1] The Idaho residual exception is essentially identical to Fed. R. Evid. 803(24).

[2] Giles also appealed, claiming that the admission of the younger child's hearsay statements violated Idaho R. Evid. 803(24). Pet. App. 27. The Idaho Supreme Court affirmed, holding that the trial court had properly applied that hearsay exception. *State* v. *Giles*, 115 Idaho 984, 772 P.2d 191 (1989) (reproduced at Pet. App. 23-54). Giles did not raise a Confrontation Clause claim. Pet. App. 32.

First, the court found Dr. Jambura's "interview technique" to be unduly suggestive because he had used "blatantly leading questions." Second, the court stated that Dr. Jambura had come to the interview "with a preconceived idea of what the child should be disclosing." Finally, the court found the interview to be "inadequately reviewable" because "the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial." Pet. App. 8. The court evaluated those factors in light of the child's "tender years," and theories of developmental psychology that regard the memories of young children as especially sensitive to suggestion. *Id.* at 8-15. Against that background, the court found that the daughter's statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate." *Id.* at 17.

SUMMARY OF ARGUMENT

The Confrontation Clause protects a defendant's right to cross-examine witnesses against him. It does not, however, bar the admission of every hearsay statement. The question whether confrontation is required for a particular hearsay statement focuses on the declarant's unavailability and the reliability of the out-of-court statement. When a statement falls within a firmly rooted hearsay exception, reliability concerns are satisfied without more. Even if no such exception applies, reliability can be established if the statement is shown to have "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980).

A. A statement not falling within a firmly rooted hearsay exception may be admitted if a court finds from the surrounding circumstances that the statement is sufficiently trustworthy and that it is unlikely that cross-examination of the declarant would significantly undermine the statement's reliability.

In admitting the statements of respondent's younger daughter, the trial court in this case focused on the strong corroborative evidence for the statements, the absence of a motive

to lie, the implausibility that a young child could have invented the statements, and other factors. The trial court's analysis supports the conclusion that sufficient "particularized guarantees of trustworthiness" were present to satisfy the Confrontation Clause. Moreover, it is difficult to imagine what respondent could have hoped to establish through cross-examination of her three-year-old daughter. Even if on cross-examination respondent had managed to get the girl to disown her earlier statements, those statements, which were made to a medical professional shortly after the events occurred, would have lost little of their impact and would have remained reliable and trustworthy evidence against respondent.

The Idaho Supreme Court erred by setting forth general rules for the interviewing process that it believed had to be met before a child's out-of-court statements could satisfy the Confrontation Clause. In addition, the court erroneously focused on the veracity and accuracy of Dr. Jambura's trial testimony, rather than on the statements that were admitted through Dr. Jambura's testimony. The Confrontation Clause requires an inquiry into the reliability of the hearsay statements themselves; that inquiry does not turn on the reliability of the witness who relates those statements.

B. In determining whether a statement has the required guarantees of reliability, courts have considered as one factor the resemblance between the statement and any traditional hearsay exceptions. Here, the hearsay exception for statements "made for purposes of medical diagnosis or treatment" furnishes support for admitting the statements of respondent's daughter over the Confrontation Clause objection. The hearsay rules have long recognized an exception for statements made for purposes of medical treatment. The exception recognizes that patients have a powerful motive to speak truthfully to their physicians in order to secure proper medical attention. The medical exception has supported the admission of hearsay statements in many federal cases involving sexual abuse of children.

The admission of hearsay statements made for purposes of medical treatment does not infringe a defendant's rights under the Confrontation Clause. The unavailability of the declarant

need not be shown because statements made to doctors derive much of their reliability from the context in which they were made. In addition, such statements possess the required indicia of reliability because they fall within a firmly rooted hearsay exception. For that reason, the courts of appeals have ruled that when statements are admitted under the medical exception to the hearsay rule, the Confrontation Clause is satisfied without more.

In this case, the State offered the medical exception as one basis for admitting the statements of respondent's daughter and made a showing in the trial court to establish the foundation for applying that exception. The trial court, however, did not rely on that ground, instead admitting the statements under the residual hearsay exception. The hearsay question, of course, is not before this Court. Nonetheless, the resemblance between the context of the statements here and the context required for the medical exception is relevant. Even if not precisely within the medical exception, the statements in this case have some of the same assurances of reliability that underlie the medical exception. That consideration strengthens the conclusion that particularized guarantees of trustworthiness are present.

ARGUMENT

THE IDAHO SUPREME COURT ERRED IN HOLDING THAT THE ADMISSION OF THE OUT-OF-COURT STATEMENTS OF RESPONDENT'S DAUGHTER VIOLATED THE CONFRONTATION CLAUSE

Although this Court has not fully explicated the relationship between the Confrontation Clause and the hearsay rules, a basic approach has emerged. The Confrontation Clause protects the right of a defendant in a criminal trial to cross-examine witnesses against him. *Cruz* v. *New York*, 481 U.S. 186, 189 (1987). The Court has long recognized, however, that the Confrontation Clause does not bar the admission of every hearsay statement. *Mattox* v. *United States*, 156 U.S. 237 (1895); *Bourjaily* v. *United States*, 483 U.S. 171, 182 (1987). Because the exclusion

of all hearsay would work "extreme" and "unintended" results, *Ohio* v. *Roberts*, 448 U.S. 56, 63 (1980), this Court has sought to reconcile the competing interests in admitting probative evidence in criminal trials and in safeguarding the defendant's right to challenge the reliability of statements through cross-examination. *Bourjaily*, 483 U.S. at 182. Cf. *Coy* v. *Iowa*, 108 S. Ct. 2798, 2803 (1988).[3]

The initial step is to determine whether the declarant must be shown to be unavailable before the hearsay statement will be admitted. *United States* v. *Inadi*, 475 U.S. 387, 394-400 (1986) (unavailability not required for co-conspirator statements); *Roberts*, 448 U.S. at 65 & n.7. The second step is whether the out-of-court statement has sufficient "indicia of reliability" to justify its admission without cross-examination of the declarant. *Bourjaily*, 483 U.S. at 182. Because the "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U.S. 149, 155 (1970), no further inquiry into a statement's reliability is required "when the evidence 'falls within a firmly rooted hearsay exception.'" *Bourjaily*, 483 U.S. at 183; *Roberts*, 448 U.S. at 66. When a firmly rooted hearsay exception does not apply, reliability concerns can be satisfied if there are reasons suggesting that the statement is unusually likely to be trustworthy. *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986). Those principles comport with the recognition that "[t]he right to cross-examination, protected by the Confrontation Clause, * * * is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987).[4]

[3] For confrontation purposes, the Court has accepted, as a point of departure, "McCormick's definition of hearsay as 'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.' E. Cleary, *McCormick on Evidence* § 246, p. 584 (2d ed. 1972)." *Lee* v. *Illinois*, 476 U.S. 530, 543 n.4. (1988). See Fed. R. Evid. 801(c). Admission of out-of-court statements for nonhearsay purposes "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985).

The issue in this case is not related to the issue in *Coy* v. *Iowa*, *supra*. There, the Court held that a defendant has a right under the Confrontation Clause to "confront" face-to-face the witness giving evidence against him at trial. The issue in this case is the quite different Confrontation Clause issue of whether particular out-of-court statements can be admitted without the declarant taking the stand at all.

A. The Court Below Erred In Analyzing Whether The Hearsay Statements Made by Respondent's Daughter Had Particularized Guarantees Of Trustworthiness

Although this Court has made clear that a statement falling outside a firmly rooted hearsay exception may still be admitted if it has "particularized guarantees of trustworthiness," *Ohio* v. *Roberts*, 448 U.S. at 66, the Court has not articulated the factors governing the application of that principle in a particular case. In our view, the Idaho Supreme Court erred in formulating a standard that emphasizes rigid procedural rules in the interviewing process, as opposed to considering the entire factual mosaic surrounding the out-of-court statement and the practical value of cross-examination.

1. *A court should determine the trustworthiness of a statement from all the surrounding circumstances, and should consider whether cross-examination would have practical value in testing the statement's reliability*

This Court in *Dutton* v. *Evans* rejected a Confrontation Clause challenge to the admission of an out-of-court statement that was not within a well-settled hearsay exception. In *Dutton*, respondent Evans was tried for murder. A cellmate of Evans' accomplice testified that the accomplice had said, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in

[4] The Court has also indicated that no inquiry into "indicia of reliability" is required "when a hearsay declarant is present at trial and subject to unrestricted cross-examination." *United States* v. *Owens*, 484 U.S. 554, 560 (1988).

this now." 400 U.S. at 77.[5] A plurality of the Court concluded that the statement was sufficiently reliable to be admitted against Evans, despite the absence of an opportunity for cross-examination of the accomplice. The plurality pointed to several factors that supported the reliability of the statement: first, it did not expressly make an assertion of past fact; second, the introduction of other evidence established that the accomplice was in a position to know about Evans' role in the crime; third, it was unlikely that the accomplice's statement was based on faulty memory; and, fourth, the circumstances of the statement supported its truth, in that there was no apparent motive for the accomplice to lie, the statement was spontaneous, and it was a declaration against penal interest. *Id.* at 88-89.[6]

More important than the particular factors described in *Dutton* was the plurality's rationale. The plurality observed that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' " 400 U.S. at 89 (quoting *California* v. *Green*, 399 U.S. at 161). In light of that concern, the Confrontation Clause was not violated, because the possibility that Evans could have undercut the statement's reliability through cross-examination was "unreal." 400 U.S. at 89.

In *Lee* v. *Illinois*, the Court again recognized that hearsay not covered by a firmly rooted exception may have sufficient "indicia of reliability" to overcome a presumption that it is inadmissible under the Confrontation Clause. The issue in *Lee* was whether a co-defendant's confession satisfied reliability con-

[5] The statement did not fall within a firmly rooted hearsay exception, as it was admitted under a Georgia statute that varied from the common law by covering co-conspirator statements made after the termination of the conspiracy. See *Dutton*, 400 U.S. at 80-83 (comparing federal and state co-conspirator statement exceptions); *Bourjaily*, 483 U.S. at 183 (analyzing *Dutton*).

[6] Justice Harlan concurred in the result based on his view that the Confrontation Clause was not intended to regulate the admission of hearsay, and that the admission of the accomplice's statement did not violate due process. 400 U.S. at 93-100.

cerns because it "interlock[ed]" with the confession of the defendant. Comparing the two confessions, the Court found factual discrepancies that went to the heart of the issue at trial. 476 U.S. at 546. The Court thus rejected the claim that the co-defendant's confession was sufficiently trustworthy to be admitted without cross-examination. The Court nevertheless reaffirmed the principle that hearsay may be found reliable enough to be admitted without cross-examination when it is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Id.* at 543.

The courts of appeals have followed the lead of *Dutton* and *Lee* in examining the particular facts and circumstances that surround hearsay statements not falling within an established exception. As a matter of constitutional law, the courts have recognized that "[t]here is no mechanical test for determining the reliability of out-of-court statements." *Barker* v. *Morris*, 761 F.2d 1396, 1400 (9th Cir. 1985) (Kennedy, J.). In each case, the ultimate question is whether the hearsay statement has "sufficient indicia of reliability in order to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statements." *United States* v. *Iron Shell*, 633 F.2d 77, 87 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). The proper inquiry should take into account all relevant information bearing on a statement's reliability. If no plausible line of cross-examination could have detracted from the statement's essential reliability under a practical view of the facts, there is no offense to the values of confrontation in admitting it. Compare *Delaware* v. *Van Arsdall*, 475 U.S. 673, 680 (1986).[7]

[7] Some courts have found it useful to examine the standards developed in applying the residual exceptions to the hearsay rules. Fed. R. Evid. 803(24), 804(b)(5). See, e.g., *United States* v. *Nick*, 604 F.2d 1199, 1203 (9th Cir. 1979); *United States* v. *Dorian*, 803 F.2d 1439, 1444-1445 (8th Cir. 1986). Cases analyzing the question whether a statement has "circumstantial guarantees of trustworthiness" equivalent to those of the specific hearsay exceptions, see, e.g., *State* v. *Sorenson*, 143 Wis.2d 226, 243-254, 421 N.W.2d 77, 83-88 (1988), and authorities explaining and applying the traditional rationales of the hearsay exceptions, see 5 J. Wigmore, *Evidence*, § 1422, at 253-254 (J. Chadbourne rev. 1974), may be of value in identifying relevant considerations in the constitutional inquiry.

Without purporting to set forth an exhaustive list, we note that courts have considered the following factors to be significant, particularly in the child-abuse context: the corroborative evidence for a statement, including physical evidence of abuse [8] and the defendant's opportunity to have committed it; [9] the child's motive in a particular situation to be truthful; [10] the identity of the person to whom the statement is made and the nature of the questioning that elicited it; [11] the plausibility of fabrication in light of the child's age,[12] specific statements,[13] and spontaneity of expression; [14] the proximity in time between the statement and the event; [15] and the relationship between the statement and any traditional hearsay exceptions. [16] There may, of course, be other features of the case that enhance the reliability of the statement and affect the impact on the

[8] See *United States* v. *Nick*, 604 F.2d at 1204 ("The child's statement was corroborated by physical evidence on his person and on his apparel.").

[9] *State* v. *Sorenson*, 143 Wis.2d at 246, 421 N.W.2d at 85.

[10] *State* v. *Sorenson*, 143 Wis.2d at 244, 421 N.W.2d at 84.

[11] *United States* v. *Dorian*, 803 F.2d at 1444 (questioners were "careful not to use leading or suggestive questions during any of the interviews").

[12] *United States* v. *Dorian*, 803 F.2d at 1445 ("a declarant's young age is a factor that may substantially lessen the degree of skepticism with which we view [her] motives").

[13] *United States* v. *Nick*, 604 F.2d at 1204 ("The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years."); *Nelson* v. *Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989) ("Merely playing with anatomically correct dolls would not have given her the idea that one might be sprayed in the face with 'white mud' from an erect penis; the dolls aren't *that* anatomically correct.").

[14] Compare *Dutton* v. *Evans*, 400 U.S. at 88-89.

[15] *Morgan* v. *Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) (statements were made "within three hours of the child's first opportunity to speak with her mother").

[16] Compare *Barker* v. *Morris*, 761 F.2d at 1401-1402 (noting analogies in statement to dying declarations and declarations against penal interest).

truth-seeking function of the trial of admitting the evidence without cross-examination.[17]

2. *The statements of respondent's daughter have particularized guarantees of trustworthiness*

The trial court in this case relied on several factors in determining that Idaho's residual exception to the hearsay rule was satisfied. The trial court noted that there was physical evidence of sexual abuse of the younger daughter that corroborated her statements. The court also observed that the daughter had no apparent motive for fabrication, and that the statements themselves were inconsistent with fantasy on the part of such a young girl. Further, the court closely examined the circumstances surrounding the most important aspect of the daughter's statements: the identification of her father as the abuser. The court noted that the doctor had testified that the physical injuries were inflicted at a time when her father and respondent had custody of her. The older daughter, who did testify at trial, had identified her father and respondent as having abused the younger child. Moreover, the younger child was perfectly capable of identifying her father, who was, of course, quite familiar to her. Pet. App. 30-31. These considerations led the trial court to believe that the child's statement possessed adequate circumstantial guarantees of trustworthiness.[18]

[17] See J. Myers, *Child Witness Law and Practice* § 5.37, at 360-372 (1987) (listing 30 factors that courts have considered in determining whether the testimony of a child is admissible under the residual exception). Some States have expressed policy judgments regarding the factors to be examined in admitting the hearsay statements of children in child abuse cases. See Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523, 534 n.50 (1988) (collecting state statutes). As long as the statute adequately provides for a "case-specific finding of necessity," *Coy* v. *Iowa*, 108 S. Ct. 2798, 2805 (1988) (O'Connor, J., concurring), there is no barrier under the Confrontation Clause to acknowledging legislative guidance in this area.

[18] In approving the admission of these statements under the hearsay rule, the Idaho Supreme Court in *State* v. *Giles*, 115 Idaho at 988 n.2, 772 P.2d at 194-195 n.2, added that there was no custody battle that might have supported speculation that a parent had instigated false accusations of sexual abuse. In addition, the events recounted by the girl were recent enough for her to recall them easily, and she spontaneously described the abuse of her sister; both of those circumstances add to the trustworthiness of the statements.

At the same time, an opportunity to cross-examine the three-year-old declarant would have done little, if anything, to undermine the reliability of her statement to Dr. Jambura. A three-year-old would doubtless have difficulty remembering an event that occurred six months earlier, and at best would have a much poorer recollection than she had shortly after the event. Moreover, the pressure of her parents' influence would make any denial of the abuse or failure to recall it far less credible than her statements to Dr. Jambura. In short, because live testimony from the victim would be less reliable (and probably less impressive to a finder of fact) than the earlier, out-of-court declarations, it is unlikely that cross-examination of respondent's daughter would been of much assistance to respondent. See *United States* v. *Inadi*, 475 U.S. at 395-396 (live testimony from co-conspirators likely to be much less convincing than declarations made during the course of the conspiracy).

3. ***The Idaho Supreme Court applied incorrect standards under the Confrontation Clause***

The Idaho Supreme Court did not analyze the hearsay statements of the younger daughter under the approach we have set forth. Rather, the court seemed to believe that special rules had to be observed in any interview involving a child before the child's out-of-court statements could satisfy the Confrontation Clause. In addition, the court seemed to focus on the quality of Dr. Jambura's trial testimony rather than on the statements of the younger daughter in determining whether particularized guarantees of trustworthiness were present. That approach is not compatible with the individualized inquiry into the reliability of hearsay statements required by the Confrontation Clause.

a. The Idaho Supreme Court justified its holding as follows:

> [T]he hearsay declarations of the younger Wright girl are not trustworthy because of Dr. Jambura's interview technique: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation. Further, the statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.

Pet. App. 7-8. None of those reasons supports the court's finding of a constitutional violation. The Constitution does not require that doctors and young sex abuse victims conform their interviews to a rigid and prescribed formula in order to withstand Confrontation Clause scrutiny.

First, it is unrealistic to suppose that each time the prospect of sexual abuse is raised, a doctor must suspend his normal practice and locate sophisticated audio-visual equipment in order to preserve every detail of the doctor's interaction with the child. In *Nelson* v. *Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989), the court rejected a similar suggestion, pointing out that the approach was not "feasible." When a doctor is consulted to interview a victim of sex abuse, the doctor cannot know that a criminal prosecution is likely to follow. Moreover, "a routine practice of videotaping therapy sessions with child victims of sexual abuse" would be seen as inappropriate in many situations. *Ibid*. If videotaping were begun only when the prospect of criminal charges surfaced, a defendant could later argue that the contents were unreliable because the earlier sessions were not preserved. And videotaped sessions arranged after the initial interview might well may lack the recency and spontaneity that contribute so significantly to the reliability of the victim's statements.

The court's criticism of Dr. Jambura's questioning style was similarly flawed. Dr. Jambura testified that he engaged the two-year-old girl in conversation by discussing neutral subjects such as what she had for breakfast. He then turned the conversation to her homelife in a general way before moving to her interaction with her father. His particular questions on that topic were in the form of "Do you" do this with "daddy," or "Does daddy" do this "with you." Those were perhaps the most indirect questions Dr. Jambura could have used to focus the girl's attention on the issue. J.A. 116-117. They were hardly, as the court below characterized them, "blatantly leading."

Moreover, the nature of the child's responses strongly undercuts the court's implication that the idea of sexual abuse was implanted by Dr. Jambura. The doctor testified that the girl's demeanor changed markedly when he asked whether sexual touching had occurred. Although she acknowledged that her father had touched her with his "pee-pee," she fell silent at the following question whether she had touched her father, until volunteering a few moments later that he "does do this with me, but he does it a lot more with my sister than with me." Pet. App. 61-62. Her change in demeanor, her dampened level of responsiveness, and her spontaneous disclosure that "he does it a lot more with my sister than with me" convincingly rebut the suggestion that leading questions interfered with the accuracy of her responses. Indeed, the contents of the girl's last response were not foreshadowed in any way by Dr. Jambura's questions.

Finally, the court did not fully explain its supposition that Dr. Jambura "may very well have had preconceptions." Pet. App. 15. In any event, there is no basis for speculating that the child's statements were tainted simply because Dr. Jambura was not a *tabula rasa* when he began the examination. In most cases, doctors who examine a child for sexual abuse will be fully informed about the purpose in advance. That is especially true when a specialist is called in. The Constitution cannot be read to create a per se rule that a doctor must be ignorant of the reasons for a consultation in order for statements made to him to be trustworthy.[19]

In forming its constitutional conclusions, the court relied heavily on psychological theories about the suggestibility of children and the vulnerabilty of their memories. Pet. App. 8-15. But there is no general consensus on such theories of memory. See Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1,

[19] Among other things, such an assumption would be incompatible with the rationale undergirding the medical exception to the hearsay rule. See Fed. R. Evid. 803(4). Moreover, the court's suggestion that the doctor should be in the dark makes the court's procedural guidelines for interviewing internally inconsistent. The court suggested that all consultations should be videotaped. But a doctor with no idea that sexual abuse was on the agenda could hardly be expected to set up video equipment on the spur of the moment.

100 (1989) ("modern research is rapidly exploding the old bromide that children are always highly suggestible"). As a matter of state law, Idaho may apply its rules of evidence in light of asserted scientific truths as it sees fit. For example, many States, including Idaho, have relied on theories about the vulnerability of memory to impose procedural restraints on the admissibility of hypnotically enhanced or refreshed testimony. See *State* v. *Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); cf. *Rock* v. *Arkansas*, 483 U.S. 44, 58-61 (1987) (discussing theories of the impact of hypnosis on memory and the legal response in the States). But the Confrontation Clause does not embody the particular views of memory and suggestibility that may appeal to a particular state court at a particular time. The court thus erred in approaching the conversation between Dr. Jambura and the respondent's younger daughter with an air of extreme skepticism based on unproved psychological theories.

b. The court also erred in allowing extraneous considerations to influence its Confrontation Clause analysis. For example, the court was troubled by the ambiguity of Dr. Jambura's description of the younger child's "admission" that her father had touched her with his "pee-pee." Pet. App. 15-16. The court stated that "[w]hether she said 'yes' or nodded agreeably is unclear." *Ibid.* But Dr. Jambura was a witness at trial, and if his narration was vague or ambiguous, the particulars could have been clarified on cross-examination of him. There is no basis for finding the hearsay statements to which Dr. Jambura testified lacking in trustworthiness simply because those statements could have been expressed more precisely by the testifying witness. Cf. *United States* v. *Owens*, 484 U.S. 554, 559-560 (1988).

Likewise, the court expressed disbelief about Dr. Jambura's veracity by qualifying its summary of his testimony with the remark that the younger daughter had "allegedly" volunteered the statement that her father had abused her but had done it more with her sister. Pet. App. 4. Again, doubts about Dr. Jambura's veracity could have been thoroughly explored in cross-examination of him. Compare *Dutton* v. *Evans*, 400 U.S. at 89 (noting that the defendant had exercised his right to confront the testifying witness on the "factual question" whether he actually heard the hearsay statement implicating the defendant); *United States* v. *Owens*, 108 S. Ct. at 842-843. The confrontation issue is not whether the statement was made, but whether the assertion it contains has "indicia of reliability." Doubts about whether the statement was made at all cannot be used to hold a hearsay statement constitutionally unreliable.

B. The Hearsay Statements In This Case Have Additional Guarantees Of Reliability Because Of Their Resemblance To Statements "Made For Purposes Of Medical Diagnosis Or Treatment"

The conclusion that a statement has particularized guarantees of trustworthiness may be supported by presence of circumstances that are analogous to the traditional hearsay exceptions. Cf. *Dutton* v. *Evans*, 400 U.S. at 89; *Barker* v. *Morris*, 761 F.2d at 1401. The statements in this case gather such additional reliability from their resemblance to statements satisfying the requirements of the "medical exception" to the hearsay rule.

1. The hearsay rules have long recognized an exception for statements made for purposes of medical treatment. Underpinning the exception is the recognition that patients have a powerful motive to speak candidly and truthfully to their physicians in order to secure proper medical attention. Such statements are therefore sufficiently trustworthy to be admitted without cross-examination. See *Meany* v. *United States*, 112 F.2d 538, 539

(2d Cir. 1940) (L. Hand, J.). As the Advisory Committee on the Federal Rules of Evidence explained, "[e]ven those few jurisdictions which have shied away from generally admitting statements of present conditions have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful." 28 U.S.C. App., p. 722 (1982). The Committee also observed that descriptions of past conditions and medical history, as well as narrations of causation that are "reasonably pertinent" to the purposes of consultation, are supported by the same guarantees of reliability. *Ibid.*

Federal Rule of Evidence 803(4) was framed in light of those principles. It provides an exception to the hearsay rule whether or not the declarant is available, and covers "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The federal rule incorporated the common law exception but broadened its coverage to include statements made for diagnosis *or* treatment.[20] The Committee explained that under "[c]onventional doctrine," statements made to a doctor only to inform him sufficiently to testify as an expert were not admitted under the medical exception. Advisory Committee Notes, 28 U.S.C. App., p. 722 (1982). The Committee rejected that limitation because a testifying expert would in any event be

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[20] See H.R. Rep. No. 650, 93d Cong., 1st Sess. 14 (1973); S. Rep. No. 1277, 93d Cong., 2d Sess. 27 (1974); 4 D. Louisell & C. Mueller, *Federal Evidence* § 444, at 592-593 (1980 & Supp. 1989); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(4)[01], at 803-143, 803-145 (1988). Rule 803(4) may also have expanded upon common law principles in allowing not only statements of present symptoms, but also statements of past symptoms and those relating to causation. See *United States* v. *Iron Shell*, 633 F.2d at 83, 85; compare *United States* v. *Nickle*, 60 F.2d 372, 373-374 (8th Cir. 1932). Although the common law in some jurisdictions did not allow statements of past symptoms, the rule was evolving toward the admissibility of such statements, as supported by the same guarantees of trustworthiness that are found in statements about present symptoms. See 6 J. Wigmore, *Evidence* § 1722, at 118-127 (J. Chadbourne rev. 1976).

entitled to indicate the basis for his opinion, which would include such hearsay statements. The Committee believed that "the distinction thus called for was one most unlikely to be made by juries." *Ibid.*[21]

The medical exception applies to statements made to psychiatrists, see *United States* v. *Lechoco*, 542 F.2d 84 (D.C. Cir. 1976); *United States* v. *Deland*, 22 M.J. 70, 73 (C.M.A.), cert. denied, 479 U.S. 856 (1986), and psychologists, see *United States* v. *Provost*, 875 F.2d 172, 177 (8th Cir.), cert. denied, 110 S. Ct. 170 (1989). Moreover, the rationale for the exception covers statements that are intended to be relayed to medical professionals. Thus, the Advisory Committee notes explain that the exception can apply to "[s]tatements made to hospital attendants, ambulance drivers, or even members of the family." 28 U.S.C. App., p. 722 (1982).

In *United States* v. *Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981), the court of appeals formulated a two-part test for determining the admissibility of statements under Fed. R. Evid. 803(4). The court required a trial court to ask, "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in the diagnosis or treatment." 633 F.2d at 84. The court justified its analysis by reference to the two underlying rationales of the exception – the reliability of statements made by a patient motivated to tell the truth, and the trustworthiness of information that a physician is willing to use in forming his opinion. *Ibid.*

The medical exception as construed in *Iron Shell* has supported the admission of testimony in many federal cases involv-

[21] Idaho's analogue to Fed. R. Evid. 803(4) differs from the federal rule. It excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment." Idaho R. Evid. 803(4). Unlike the federal rule, Idaho does not include statements relating to "the inception or general character of the cause or external source" in the exception.

ing sexual abuse of children. For example, in *Iron Shell* itself the court allowed the testimony of a doctor about the statements made by a nine-year-old victim of sexual abuse describing the assault. The court was satisfied that the child had no motive in speaking to the doctor other than to report accurately the events that befell her. The court also found the description of her attack relevant to the "inception or general cause" of her symptoms and "reasonably pertinent to diagnosis or treatment" because it would help guide the course of the doctor's examination. 633 F.2d at 83.

United States v. *Renville*, 779 F.2d 430 (8th Cir. 1985), also demonstrates the application of Rule 803(4) in sexual abuse cases. There, a physician was permitted to relate the statements by an 11-year old girl that her father had performed sexual acts with her. In ruling that statements about the assailant's identity were covered by the medical exception, the court noted that "[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment." 779 F.2d at 436 (emphasis in original). The court explained that because "child abuse involves more than physical injury, the physician must be attentive to treating the emotional and psychological injuries which accompany this crime." *Id.* at 437.[22] Other decisions have followed the approach of *Iron Shell* and *Renville*. See *United States* v. *DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (statement to a social worker); *United States* v. *Shaw*, 824 F.2d 601, 608 (8th Cir. 1987) (statement to examining physician, who had prescribed treatment); *United States* v. *Provost*, 875 F.2d at 177 (statements to doctors during physical

[22] The court thus rejected intimations in *United States* v. *Iron Shell* (633 F.2d at 77) that statements identifying the assailant in sex abuse cases should not generally be admitted under the exception. *Renville* explained that although statements of "fault" are not covered by the medical exception when a patient is explaining the causes of bodily injury, the same considerations are not applicable to sexual assaults, where treatment has a psychological dimension as well. 779 F.2d at 439.

and psychological treatment); *United States* v. *Spotted War Bonnet*, 882 F.2d 1360, 1364 n.2 (8th Cir. 1989) (statement to clinical psychologist), petition for cert. pending, No. 89-6289.[23]

2. The admission of hearsay statements made for purposes of medical diagnosis or treatment does not violate a defendant's confrontation rights. Under this Court's analysis in *United States* v. *Inadi, supra*, such statements do not require a showing of the unavailability of the declarant. As in *Inadi*, the context of statements that are made to doctors in aid of diagnosis or treatment provides additional guarantees of trustworthiness that are not duplicated by in-court testimony.[24] Such statements also satisfy the "reliability" inquiry under the Confrontation Clause because they fall within a "firmly rooted" hearsay exception.

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[23] The medical exception has also played a role in many military prosecutions under Mil. R. Evid. 803(4), the counterpart to the federal rule. See 4 J. Weinstein & M. Berger, *supra*, ¶ 803(4)[03], at 363-364 (Supp. 1989) (collecting cases). Many States have also admitted hearsay statements of the victim under the medical exception in sexual abuse prosecutions. See, *e.g.*, *State* v. *Robinson*, 153 Ariz. 191, 199-200, 735 P.2d 801, 809-810 (1987) (victim's statements to psychologist, including identity of defendant, admissible); *State* v. *Hebert*, 480 A.2d 742, 748-749 (Me. 1984). Compare *Oldsen* v. *People*, 732 P.2d 1132, 1134-1136 (Colo. 1986) (declining to admit child's statement of sexual assault to social worker, psychologist, and physician, because child was not capable of appreciating need to furnish accurate information; but admitting same statements under residual hearsay exception). See generally Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257 (1989); Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523 (1988).

[24] Compare *Inadi*, 475 U.S. at 395-396 (co-conspirator statements derive much of their significance from context in which they are made). See *United States* v. *Quick*, 22 M.J. 722, 725-726 (A.C.M.R. 1986) (applying *Inadi* to sexual abuse case), aff'd on other grounds, 26 M.J. 460 (C.M.A. 1988). But see *Nelson* v. *Farrey*, 874 F.2d 1222, 1231-1233 (7th Cir. 1989) (Flaum, J., concurring) (arguing that *Inadi*'s analysis does not justify dispensing with a showing of unavailability for declarant of medical-exception statements). In any event, as in this case, the declarant will often be "unavailable" in a child sex-abuse prosecution because of a practical inability to testify meaningfully in court. See, *e.g.*, *United States* v. *Dorian*, 803 F.2d at 1446-1447.

Thus, in many sexual abuse cases, statements of the child to a treating physician may be admitted over a Confrontation Clause objection simply upon satisfying the medical exception to the hearsay rule.

The medical exception is as firmly rooted as other hearsay exceptions that this Court has addressed. Compare *Bourjaily*, 483 U.S. at 183 (co-conspirator statements); *Roberts*, 448 U.S. at 66 & n.8 (referring to dying declarations, cross-examined prior testimony, and business and public records exceptions). There is a long tradition of admitting reasonably pertinent hearsay statements made to treating physicians. See 6 J. Wigmore, *Evidence* §§ 1718-1722 (J. Chadbourne rev. 1976); C. McCormick, *Handbook of the Law of Evidence* § 292, at 690-692 (E. Cleary 2d ed. 1972).

To be sure, more complex Confrontation Clause issues may be raised as to statements made to a physician solely to enable him to give testimony.[25] Such statements are admissible under the Federal Rules of Evidence and the rules of many States, but were not generally admissible at common law. Whatever the correct Confrontation Clause analysis of such statements, those statements are not the kind presented here, or in the typical child sex-abuse case. An abused child is usually brought to a doctor or other professional principally, if not exclusively, for therapy and evaluation. Statements made in that context fully satisfy the requirements of the medical exception as formulated at common law.[26] Even when the doctor intends both to render treatment and to preserve or gather evidence in anticipation of trial, there is no reason to doubt the applicability of the exception. See *United States* v. *Iron Shell*, 633 F.2d at 86. The doctor's interest in eliciting accurate information and in im-

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[25] See *Morgan* v. *Foretich*, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part); *Nelson* v. *Farrey*, 874 F.2d 1222, 1233-1234 (7th Cir. 1989) (Flaum, J., concurring).

[26] For example, Justice Powell, sitting with the Fourth Circuit, has observed that the statements admitted by the Eighth Circuit in *United States* v. *Iron Shell* and *United States* v. *Renville* satisfied the "traditional common law test." *Morgan* v. *Foretich*, 846 F.2d at 952 (Powell, J., concurring in part and dissenting in part).

pressing the importance of candor upon the young patient applies with full force. The doctor's awareness that there may be other uses for the same information does not detract from the reliability of the statements made.[27]

3. In this case, although the State urged the application of the medical exception to the statements of respondent's younger daughter, as well as several other exceptions, the trial court did not admit the evidence under the medical exception to the hearsay rule. Instead, the court relied on Idaho's residual hearsay exception to admit the statement. See J.A. 25-26, 108-115.

The hearsay question, of course, is not before this Court. Nonetheless, the resemblance between the context of the statements here and the context required for the medical exception is relevant. Even if not precisely within the medical exception, the statements in this case have some of the same assurances of reliability that underlie the medical exception. That similarity of context strengthens the conclusion that the record establishes the particularized guarantees of trustworthiness needed to admit the statements over a Confrontation Clause objection.

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[27] Other firmly rooted hearsay exceptions may also support the admission of reports of sexual abuse by children. For example, the "excited utterance" exception, Fed. R. Evid. 801(d)(2), has been invoked in several cases. See Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745, 1753-1755 (1983). Both in sexual assault cases and in other types of prosecutions, courts have found this exception to be "firmly rooted" for purposes of satisfying Confrontation Clause objections. See *United States* v. *Vazquez*, 857 F.2d 857, 864-865 (1st Cir. 1988); *Huggins* v. *Warden*, 715 F.2d 1050, 1055-1058 (6th Cir. 1983) (reports of four-year-old victim of sexual assault to nurses and police officers), cert. denied, 464 U.S. 1071 (1984); *United States* v. *Nick*, 604 F.2d at 1202-1204 (three-year-old victim's statement to his mother identifying the defendant and describing the assault). Other exceptions may apply as well, such as the exceptions for "[p]resent sense impression," Fed. R. Evid. 803(1), or "[t]hen existing mental, emotional, or physical condition," Fed. R. Evid. 803(3).

CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted.

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